JUL 5 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1712

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

GEORGE SUMNER, Warden,
Petitioner,
v.
ROBERT MATA,
Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

QUIN DENVIR
State Public Defender

EZRA HENDON
Deputy State Public Defender

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Attorneys for Respondent

QUESTIONS PRESENTED

1. Whether this Court may or should agree to review a case that, because of petitioner's recurring neglect, is procedurally confused and virtually moot;

2. Whether this Court should agree to review a case solely because it may disagree with the Court of Appeals' reading of the record.

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

For purposes of this Opposition, respondent accepts the preliminary recitations of the Petition for Writ of Certiorari at pp. 1-13. The statement of the case should be supplemented to reflect the following events which transpired after the Petition was filed or which are not set forth in the Petition.

On January 20, 1983, the Court of Appeals' reversed and remanded the matter with the following instructions:

> "Upon remand, the District Court may hold the petition in abeyance for a period of ninety days, within which time the state prosecutors may, if they so choose, initiate a new trial against Mata, a trial in which prosecutorial evidence barred by the Federal Constitution will not be introduced." (Cert. Petition, App. C at 45; 696 F.2d 1244, 1255-1256.)

Sumner elected not to file either a petition for rehearing or a suggestion for rehearing en banc. He also failed to file a request to stay the Court of Appeals' mandate. Accordingly, pursuant to the provisions of F.R. App. P. 41(b) and Rules of the Ninth Circuit, Rule 17, the mandate issued on February 10, 1983. The mandate was actually spread in the United States District Court for the Northern District of

California on February 14, 1983. Not until April 7, 1983, did petitioner initiate efforts to stay the effect of the Court of Appeals' order. At that time, he filed an "Emergency" Motion in the Court of Appeals to recall the mandate and then stay it. Mata filed an opposition to this motion pointing out, inter alia, that this was the second time in this case that Sumner had failed to seek a timely stay, and that he had given the same excuse both times. Both in February, 1980 and in April, 1983, Sumner advised the Court of Appeals that he had confused the ninety-day period within which to petition for certiorari under 28 USC § 2101(c) with the ninety-day period the District Judge was ordered to hold the petition in abeyance and on that account had overlooked the provisions of F.R. App. P. 41. (See "Motion For Recall and Stay of Mandate", 9th Cir. 78-2636, filed February 27, 1980; and see "Emergency Motion for Recall of Mandate . . ." 9th Cir. 78-2636, filed April 7, 1983.) On May 5, 1983 the Court of Appeals denied petitioner's "Emergency" Motion.

Petitioner's "Motion for Recall of Mandate of United States Court of Appeals for the Ninth Circuit and for Stay of Mandate" presented to Justice Rehnquist as Circuit Justice was denied by him without comment on May 9, 1983.

Petitioner then filed a motion in the District Court on or about May 17, 1983, asking that court to stay issuance of the Ninth Circuit's mandate. The motion was denied on June 24, 1983.

In the meanwhile, Mata was returned to Kern County Superior Court and rearraigned on or about May 13, 1983. A trial date of August 29, 1983 has now been set.

With regard to the facts underlying this case, respondent refers the Court to the opinion of the Court of Appeals.

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ARGUMENT

I

BECAUSE OF PETITIONER'S RECURRING NEGLECT IN SEEKING A STAY, THIS CASE IS NOW IN AN INAPPROPRIATE PROCEDURAL POSTURE FOR CERTIORARI PURPOSES

Because of its continuing and recurring neglect, petitioner has presented the court with a procedurally muddled case that is on the verge of mootness, if it is not already moot. On January 20, 1983, the Court of Appeals gave the state ninety days within which to retry Mata consistent with the federal constitution, or to release him.[1/] (See Cert. Pet. App. C, at 45; 696 F.2d 1244, at 1255-1256.) If petitioner was dissatisfied with the choice he was given on January 20 then he was obliged to take timely action to maintain the status quo pending review of the Court of Appeals' order. Instead, for the second time in this litigation, petitioner allowed the time within which to stay the Court of Appeals' mandate to elapse without seeing a stay. The result is that on February 14, 1983 the Court of Appeals' mandate was spread in the District Court. On May 13, 1983 respondent Mata was arraigned in Kern County Superior Court, and after one continuance a trial date of August 29, 1983, was set. Petitioner's efforts to recall and stay the Court of Appeals' mandate addressed to Circuit Justice Rehnquist, to the Court of Appeals, and even to the District Judge who originally heard the habeas petition have all failed.[2/]

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1. While the Court of Appeals' order reversing and remanding does not explicitly call for Mata's release should the state fail to retry him, that is the clear implication of that order, and conditional grants of habeas corpus relief such as this one are common in the Ninth Circuit. (See, e.g., Brown v. Craven, 424 F.2d 1166, 1170 (9th Cir. 1970); Gladden v. Unsworth, 396 F.2d 373, 381 (9th Cir. 1968); and see Hart v. Eyman, 458 F.2d 334, 338 (9th Cir. 1972).)

2. On May 5, 1983 California's "Emergency Motion for Recall of Mandate and for Stay of Mandate Pending Review on Certiorari" was denied by the United States Court of Appeals for the Ninth Circuit. (U.S. Court of Appeal No. 78-2636.) On May 9, 1983 its "Motion for Recall of Mandate of United

(footnote 2 continued)

If Sumner was unhappy with the choice he was given on January 20, 1983, he ought to have moved in a timely fashion to relieve himself of the necessity of making the choice. He did not do so because of his own recurring neglect, and should not now be heard to complain about having been forced to make the choice given to him by the Ninth Circuit.

This is not the first time petitioner has failed to seek a stay in this case in a timely fashion. When certiorari was first sought in 1980 in Mata-I (449 U.S. 539 (1981)), Sumner had also failed to move for a stay in a timely fashion before the Ninth Circuit. His reason for that dereliction was identical to the one that has been tendered in his various applications to recall the present Ninth Circuit mandate. Then as now Sumner has pleaded confusion between the ninety-day period within which Mata could be retried and the ninety-day period to petition for certiorari under 28 USC § § 2101(c).[3/] Sumner has therefore not taken timely action to

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(footnote 2 continued)

States Court of Appeals for the Ninth Circuit and for Stay of Mandate" was denied by Justice Rehnquist. (No. A-904.) On June 24, 1983, the "Motion for Stay of Issuance of Mandate Pending Review on Certiorari" was denied by District Judge Stanley Weigel. (N.D. Cal. C-77-2801.)

3. Compare, e.g., Sumner's excuse in his "Emergency Motion" filed in the Ninth Circuit now:

> "This Court's latest opinion in this case was filed on January 20, 1983. Noting that: (1) under the provisions of 28 USC section 2101(c), a petition for certiorari would be timely if it were filed within 90 days of that date and (2) under the provisions of this Court's decision the district court on remand was to hold the petition in abeyance for a 90 day period during which a new trial could be commenced in the California courts, [counsel] inadvertently overlooked the fact that an application for stay of mandate should be filed before issuance of the mandate to the district court and assumed that a stay application would be timely if it were filed within 90 days of January 20, 1983."

with the excuse presented to that court in 1980:

> "Since the time period for filing a petition for habeas corpus proceedings is ninety days, it therefore appeared that this Court had stayed the proceeding for ninety days, the period during which a petition for writ of certiorari could be filed." (Motion for Recall and Stay of Mandate, 2/26/80, p. 5.)

be relieved of having to choose between releasing Mata and commencing his retrial. Because of this, petitioner has elected the more favorable of the choices he was given, and a retrial has begun. Under these circumstances, Sumner should not now be heard to complain about having had to make an election.

In any event, it is quite clear that this case could not be heard and decided by this Court while there is still a live case or controversy in existence. The case will go to trial on August 29, 1983. Whether Mata is acquitted or convicted, this Court could not enter an order that would have an impact on the parties. For this reason alone, certiorari should be denied.

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II

ON ITS MERITS, THIS CASE IS NO LONGER "CERT.-WORTHY"

The Court of Appeals has fully complied with this Court's mandate in Mata-II (455 U.S. 591 (1982)) and no issue of legal significance remains to be decided. For the following reasons, therefore, certiorari should be denied.

First, the original basis for hearing the case is no longer presented. When Justice Rehnquist, acting as Circuit Justice, originally stayed the mandate in this case it was because in his view a "tension" existed between the analysis of the Court of Appeals and that of other courts, including that of this Court, on the necessity for the state to have foregone a live lineup. (Sumner v. Mata, 446 U.S. 1302, 1304-1305 (1980) (Rehnquist, J., in chambers).) That issue, which had been "lurking in the background of this case" since its inception (see Mata-II, Sumner v. Mata, supra, 445 U.S. 59, 600 (1982) (Stevens, J., dissenting)), is simply no longer here. As the Petition for Certiorari itself acknowledges (Pet. at 54-55), the current Court of Appeals opinion accepts that the exclusive focus must be the reliability of the identification procedures used. The Court of Appeals explicitly stated that:

> "The rationales of Manson [v. Brathwaite, 432 U.S. 98 (1977)] and Watkins [v. Sowders, 449 U.S. 341 (1981)] dictate that the need, or lack of it, for the identification procedures employed by the prosecution's officers plays no part in the determination of the admissibility of identification evidence, a determination that focuses solely on reliability." (Petition, App. C at 39.)

The Court of Appeals further made clear that it would not consider the necessity to forego a live lineup as in any way dispositive (App. C at 40) and that it viewed the use by the state of a less reliable method of identification merely as one factor "to be considered in the totality of the circumstances." (App. C at 41.) The question of necessity to conduct a live lineup and its place in the constitutional analysis of eye-witness identification questions is thus no longer an issue in this case.

Second, the present petition, properly understood, asks this Court to take the case for no other reason than that in the state's view, the Court of Appeals was wrong. There can be no serious contention at this point that the Court of Appeals misunderstood this Court's mandate. In Mata-II this Court made very clear what it had intended by its original remand in Mata-I and stated explicitly why the Court of Appeals had not complied with that original remand. Beginning by acknowledging that "the federal courts are not necessarily bound by the state courts' findings," Sumner v. Mata, supra, 455 U.S. at 597) this Court's per curiam opinion went on to explain:

> "Our [original] remand directed the Court of Appeals to re-examine its findings in light of the statutory presumption. We pointed the way by identifying certain of its findings that we considered to be at odds with the findings of the California Court of Appeal. We asked the Court of Appeals to apply the statutory presumption or explain why the presumption was not applicable in view of the factors listed in the statute. The Court of Appeals did neither. Accordingly, we again must remand. Again we note that 'we are not to be understood as agreeing or disagreeing with the majority of the Court of Appeals on the merits of the issue of impermissibly suggestive identification procedures.' 449 U.S., at 552."

Clearly, the Court of Appeals this time accepted this Court's determination that the state Court of Appeal findings at issue were findings of fact (see App. C at 20). It also accepted this Court's conclusions that, absent some exception in 2254(d), these state court findings must be presumed to be correct. (App. C at 20-21.) With respect to each of the disputed state court findings, the Court of Appeal extensively reviewed the state court record, engaged in thorough -- indeed exhaustive -- review of the facts, and in every instance explained why the state court findings did not enjoy fair support in the record. The Court of Appeals acknowledged it was "facing up to its differences" with the state court, and, in so doing, it followed the route mapped out for it by this Court.

This Court has reviewed this case twice. Once it had the full record before it. The entire thrust of this Court's

prior opinions is that while this Court wanted the Court of Appeals to first focus on and then to satisfy the procedural requirements of 28 USC § 2254, this Court's purpose in reviewing the cases was not to substitute its judgment for that of the Court of Appeals. This Court has deliberately refrained through two remands from expressing any view on the original merits of the controversy and has even intimated to the Court of Appeals on one occasion that there was legitimate room for differences of opinion with regard to that controversy.[4/]

If this Court believed that no federal court could reach the conclusion now reached by the Ninth Circuit, it should not have, and never would have sent the case back to that court. When this Court in Mata-I explicitly did not reach the merits, and when it acknowledged in Mata-II that a federal court could reject the findings of a state court, it must have been prepared to accept that the Court of Appeals might do exactly those things in this case.

What this petition presents, then, is a fact-intensive dispute over whether the record does or does not support the view taken by the Court of Appeals. While we firmly believe the Court of Appeals was completely correct in concluding there was no fair support in the record for the state court's findings,

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4. ". . . we are not to be understood as agreeing or disagreeing with the majority of the Court of Appeals re the merits of the issue of impermissibly suggestive identification procedures. Both the California courts and the federal courts relied on the basic Simmons case [Simmons v. United States, 390 U.S. 377 (1968)] for their legal analysis. Applying the same test, the majority of the Court of Appeals for the Ninth Circuit reached a different determination than had all the other courts which considered the issue. Assuredly, this is not the first nor the last time that such a result will occur. We do think, however, that Congress was intent on some sort of written explanation of the [28 U.S.C] section 2254(d) factors when such a result does occur." Sumner v. Mata, supra, 449 U.S. at 552 (emphasis added).

we suggest that, in any event, that question is not cert. worthy.[5/]

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5. Only two other points made in the Petition for Writ of Certiorari require an answer here:

First, Marshall v. Lonberger, ___ U.S. ___, 74 L.Ed. 2d 646 (1983) is not on point. (See Petition at 31.) There are no credibility questions or implied state court findings of credibility in this case. The Court of Appeals here accepted as true the statements made by the witnesses, and simply concluded that, given that the statements were credibile, the identifications made cannot pass constitutional muster.

Seocnd, read as a whole the Court of Appeals' opinion clearly does not -- as the petition suggests -- adopt findings which it feels are supported by the record. (Petition at 36.) The Court of Appeals' entire focus is on whether the state court findings were supported. (See, e.g., App. C at 20-21; "Unless one of the eight exceptions listed on section 2254(d) is found, e.g., that a finding is 'not fairly supported by the record,' we must defer to the state court's findings." App. C at 11: "In facing up to the conflict . . . we now specifically hold that certain of the [state court's] findings are not fairly supported by the record and, therefore, need not be accorded the presumption of correctness mandated by section 2254." On opportunity to view, the Court of Appeals found the state court findings was "not fairly supported by the record." (App. C at 26.) See also App. C at page 29 (accuracy of prior description); page 43 (no showing of influence).

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

DATED: June 30, 1983

Respectfully submitted,

QUIN DENVIR
State Public Defender

Ezra Hendon

EZRA HENDON
Deputy State Public Defender

Attorneys for Respondent

EH:sms

No. 82-1712

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OCTOBER TERM, 1982

GEORGE SUMNER, Warden,
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v.
ROBERT MATA,
Respondent.

CERTIFICATE OF SERVICE BY MAIL

EZRA HENDON certifies as follows:

1. That he is an attorney admitted to practice law in the State of California, a member of the Bar of this Court, and the attorney for respondent.

2. That on July 1, 1983, he placed one copy of the Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit in the United States mails at San Francisco, California, in an envelope with postage prepaid thereon, to attorney for petitioner, as follows:

JOHN VAN DE KAMP
Attorney General
State of California
6000 State Building
San Francisco, CA 94102

3. That he certifies that all parties required to be served have been served.

DATED: July 1, 1983

Ezra Hendon

EZRA HENDON
Deputy State Public Defender

Office - Supreme Court, U.S.
FILED
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MOTION TO PROCEED IN FORMA PAUPERIS

Respondent, ROBERT MATA, by and through his counsel, asks leave to file the attached Opposition to Petition for Writ of Certiorari without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46 of the Rules of this Court.

The declaration in support of this motion is attached hereto and incorporated herein.

DATED: June 30, 1983

Ezra Hendon

EZRA HENDON
Deputy State Public Defender

Attorney for Respondent

No. 82-1712

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DECLARATION IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

EZRA HENDON declares as follows:

1. He is a Deputy State Public Defender and has been assigned to represent respondent in the above-entitled matter;

2. Respondent is now incarcerated awaiting retrial in Kern County Jail, at a great distance from declarant's business office in San Francisco;

3. Respondent has been continuously incarcerated and unemployed since the conviction which is the subject of the present proceedings. This Court has twice previously allowed respondent to proceed in forma pauperis in this case and has appointed declarant to represent him on the first of those occasions. The Kern County Superior Court in May, 1983, has found that respondent is unable to afford counsel and has appointed counsel to represent him. There are no changes in respondent's financial status since that date.

4. Because of his poverty respondent is unable to pay the costs of this cause. Respondent believes he is entitled to prevail in this case. Briefly stated, the nature of this cause is as follows:

On July 4, 1973, he was sentenced to life imprisonment for first degree murder in the Superior Court of California, County of Kern. A petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging that conviction was subsequently

filed in and denied by the United States District Court for the Northern District of California. That decision was reversed on appeal (Mata v. Sumner, 611 F.2d 754 (9th Cir. 1979); this Court then vacated and remanded for further proceedings (449 U.S. 5393 (1981). The Court of Appeals again vacated and remanded (649 F.2d 713) and this Court summarily reversed and remanded (455 U.S. 591 (1982)). The Court of Appeals' response to this Court's second remand is the subject of the present certiorari petition.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 30th day of June, 1983, in San Francisco, California.

Ezra Hendon

EZRA HENDON
Deputy State Public Defender

Attorney for Respondent

EH:sms

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CERTIFICATE OF SERVICE BY MAIL

EZRA HENDON certifies as follows:

1. That he is an attorney admitted to practice law in the State of California, a member of the Bar of this Court, and the attorney for respondent.

2. That on July 1, 1983, he placed one copy of the Motion to proceed in Forma Pauperis in the United States mails at San Francisco, California, in an envelope with postage prepaid thereon, to attorney for petitioner, as follows:

JOHN VAN DE KAMP
Attorney General
State of California
6000 State Building
San Francisco, CA 94102

3. That he certifies that all parties required to be served have been served.

DATED: July 1, 1983

Ezra Hendon

EZRA HENDON
Deputy State Public Defender

Attorney for Respondent